

MINUTES

**MONTANA SENATE
56th LEGISLATURE - REGULAR SESSION**

COMMITTEE ON JUDICIARY

Call to Order: By **CHAIRMAN LORENTS GROSFIELD**, on January 11, 1999 at 10:00 A.M., in Room 325 Capitol.

ROLL CALL

Members Present:

Sen. Lorents Grosfield, Chairman (R)
Sen. Al Bishop, Vice Chairman (R)
Sen. Sue Bartlett (D)
Sen. Steve Doherty (D)
Sen. Duane Grimes (R)
Sen. Mike Halligan (D)
Sen. Ric Holden (R)
Sen. Reiny Jabs (R)
Sen. Walter McNutt (R)

Members Excused: None.

Members Absent: None.

Staff Present: Judy Keintz, Committee Secretary
Valencia Lane, Legislative Branch

Please Note: These are summary minutes. Testimony and discussion are paraphrased and condensed.

Committee Business Summary:

Hearing(s) & Date(s) Posted: SB 16, SB 65, SB 87
Executive Action: None

HEARING ON SB 65

Sponsor: SEN. DEBBIE SHEA, SD 18, Butte

Proponents: Joe Mazurek, Attorney General
Robert McCarthy, Butte-Silver Bow County
Eileen Joyce, Butte-Silver Bow County Attorney
Don Waldron, Montana Rural Education Assoc. and
the Montana County Superintendents Assoc.

Robin Bulleck, Citizen
 Loren Frazier, School Administrators Association
 Cathy Kendall, Montana Board of Crime Control
 Spencer Sartorius, Administrator of the Health
 Enhancement and Safety Division at OPI
 Bruce Messenger, Superintendent of Schools-Helena
 Bob Anderson, Montana Sheriffs and Peace Officers
 Assoc.
 Terry Minnow, Montana Federation of Teachers and
 the Montana Education Association
 Betty Waddell, Montana Association of Churches
 Lance Melton, Montana School Boards Association

Opponents: None.

Opening by Sponsor: **SEN. DEBBIE SHEA, SD 18, Butte**, introduced SB 65 on behalf of the Department of Justice, Butte-Silver Bow County Attorney's Office, and school districts throughout the state. This legislation makes it illegal to possess a weapon on school grounds. Every day teachers, administrators, clerical staff, bus aides, cafeteria workers, custodians, playground aides, etc., go the full measure to ensure children are safe as they go about their daily school schedules. Their job is compromised when safety measures give way to convenience. The amendment expands the domain of this bill from a school building to school property, which is defined in the bill.

Proponents' Testimony:

Joe Mazurek, Attorney General, rose in support to SB65. He remarked that this legislation stems from a situation in Butte last year where the county attorney wanted to be able to charge students in Youth Court who showed up at recess with a handgun. He was unable to do so. The defect in the law leaves the ability to charge to a local ordinance or rely on federal law. In the 1997-1998 school year, 13 students were expelled from school in Montana for bringing weapons to school. At least four of these incidents occurred on school grounds instead of inside school buildings. Surveys have shown that 12% of students acknowledge bringing a weapon to school. Montana's statistic is one of the highest in the nation.

This is not simply an urban bill. It would be inconvenient for students to receive permission from a trustee to bring a firearm to school, go back home for a gun to be used for hunting, or to park off the school grounds. However, these inconveniences may save the life of a student. Written testimony -

EXHIBIT(jus07a01).

Robert McCarthy, County Attorney of Butte-Silver Bow, spoke in support of the bill. The **Montana Attorneys Association** is also in support of this legislation. In April of 1994, a child was killed in Butte on school grounds. In January of 1998, there was another incident where a gun was brought to an elementary school. Since they have a charter government in Butte-Silver Bow, they have broader authority to enact regulations than other communities have. An ordinance was drafted which the government of Butte-Silver Bow passed that prohibits bringing weapons onto school grounds. The state needs a uniform law that will provide this same protection.

Eileen Joyce, Butte-Silver Bow County Attorney, explained that last January she was involved with a case that involved two 11 year old boys who brought weapons to West Elementary School. One of the children had the gun in his backpack and actually brought the gun into the school building. The other young boy only possessed the weapon on the school playground. When looking at the statute which addressed the illegality of having weapons in the school building, she was surprised to discover that the statute did not speak to school playgrounds or other facilities. This case was a chilling reminder of the terrible tragedy that occurred in April of 1994 which involved a shooting on a playground. They were fortunate enough to have a local ordinance to be able to charge the other young juvenile who brought a weapon to the school playground. This amendment will extend the statute to protect the playground and other school property and is logical and necessary.

Don Waldron, Montana Rural Education Association and the Montana County Superintendents Association, rose in support of SB65. Written testimony of **Don Waldron - EXHIBIT(jus07a02)**.

Robin Bulleck, Citizen, stated that her oldest children were identical twins. Four years ago, her son Jeremy was shot at Margaret O'Leary Elementary School. He died a day later. He was not the intended victim of the ten year old carrying the gun. Following Jeremy's death, legislation was passed making it illegal to possess a gun within a school building. This did not cover the surrounding property. Last year a similar incident, but non-fatal, occurred at West Elementary School. Her new oldest son was a student at West Elementary School. During the time of the incident last year, for weeks he was flooded with fears and nightmares of school. She added that some people believe that the reason not to adopt this legislation is that it could cause inconvenience during hunting season. She would accept all of the potential inconveniences this bill would cause to save a child.

Loren Frazier, School Administrators Association, spoke in support of SB65. Extending this statute to school grounds is self explanatory. He further noted that schools rent property to teachers, administrators, etc. He asked that the legislation clarify that for this property a resident should be able to have guns on the property.

Cathy Kendall, Montana Board of Crime Control, rose in support of SB65.

Spencer Sartorius, Division Administrator of the Health Enhancement and Safety Division at OPI, rose in support of SB65, written testimony - **EXHIBIT**(jus07a03).

Bruce Messenger, Superintendent of Schools-Helena, spoke in support of the legislation. The number one priority of all parents is that we have safe school campuses. Recently, the Helena Public Schools adopted a policy that would disallow the possession of weapons not only in our school buildings but also on school properties and activities that extend to buses. It is probably in the school building that they maintain the best order and control. There is bound to be conflicts between students. It is during informal times or times of transitions that might occur on school grounds or in parking lots, those areas that are less supervised, where this legislation is especially needed.

Bob Anderson, Montana Sheriffs and Peace Officers Assoc., rose in support of SB65.

Terry Minnow, Montana Federation of Teachers and the Montana Education Association, spoke in strong support of the legislation.

Betty Waddell, Montana Association of Churches, rose in support of SB65. She added that the third leading cause of death for children between the age of 5 and 14 is homicide. By July of 1995, more than twice as many Montanans were licensed to carry concealed handguns as were a year earlier.

Lance Melton, Montana School Boards Association, urged support of SB65.

Opponents' Testimony: None

Questions from Committee Members and Responses:

{Tape : 1; Side : A; Approx. Time Counter : 10.22}

SEN. HOLDEN asked for further clarification of the ordinance that was passed in Butte-Silver Bow County regarding this issue. **Mr.**

McCarthy explained that after reviewing the statute that was enacted by the legislature it was discovered that the statute did not include school premises. Based upon the self government they enjoy as a charter form of government, he was able to draft an ordinance that expanded the prohibition. There are only two self-powered charter counties in the state.

SEN. HALLIGAN asked if the ordinance had a provision that allowed trustees to grant permission to certain persons to have weapons on school property. **Mr. McCarthy** responded that it did not.

SEN. DOHERTY asked if the exemption which could be made by trustees for firearms to be taken to school would go to individual teachers who may reside on school property. **SEN. SHEA** explained that the legislation does make that allowance. This would also include hunter safety courses.

CHAIRMAN GROSFIELD remarked that in rural areas, a rancher may park his pickup on the edge of the football field and watch the game from there. There may be a gun in the gun rack in the pickup. This would change the culture of Montana. **Attorney General Mazurek** remarked that it simply poses an inconvenience. The rancher could park across the street as opposed to on the school property. A certain amount of law enforcement discretion enters into this as well. He doubted that the county attorney would prosecute the rancher who showed up with a gun rack in the pickup. The clear aim of the legislation addresses students bringing weapons to school. Parents expect schools to be safe.

CHAIRMAN GROSFIELD stated that people in Montana would need to understand clearly that this would include parking on school property while dropping off children at school. **Attorney General Mazurek** found it difficult to believe that someone would be prosecuted in this instance. If a student has a weapon in the gun rack in the parking lot, that is a different situation. This tries to avoid having a weapon on the school property that someone could go to in a moment of anger during the school day.

SEN. HALLIGAN questioned whether trustees could adopt a policy regarding this issue for persons attending events. **Attorney General Mazurek** believed that trustees could adopt such a policy and the legislation would also address the issue where school districts own property that is leased to teachers or others.

SEN. DOHERTY stated that the language addressed purposely and knowingly possessing, carrying or storing of weapons. He questioned if this language should include intent to use. **Attorney General Mazurek** stated that the weapon may not have been on school property to commit a violent act. It may be on the

premise and someone else uses it. He preferred that the trustees handle this at a local level through policy rather than making a deviation in the language of the criminal code.

Closing by Sponsor:

SEN. SHEA stated that all the legislative reasons for having weapons on schools can be addressed by school board policy. We need to be vigilant in our commitment to make schools safe havens for learning, growing and nurturing our youth.

{Tape : 1; Side : A; Approx. Time Counter : 10.47}

HEARING ON SB 87

Sponsor: **SEN. HARGROVE, SD 16, Belgrade**

Proponents: **Ken Hoovestal, Montana Snowmobile Association**
 Doug Monger, Administrator of the Parks Division,
 Department of Fish, Wildlife and Parks (FWP)

Opponents: **Al Smith, Montana Trial Lawyers Assoc.**
 George Ochenski, Citizen

Opening by Sponsor: **SEN. HARGROVE, SD 16, Belgrade,** introduced SB87. He stated that in 1993 there was a snowmobile accident on Forest Service land that, under an operating agreement, was groomed by the West Yellowstone Chamber of Commerce. A lawsuit followed and resulted in a partial summary judgment. This legislation was drafted to parallel the Skiers Responsibility Act. The discussion concerns the inherent risks with riding snowmobiles, a legitimate state interest in the viability of the industry, and user responsibility.

Proponents' Testimony:

Ken Hoovestal, Montana Snowmobile Association, stated that this bill was brought on behalf of the Association. In the lawsuit, the judge declared the law unconstitutional due to the gross negligence portion. This legislation would allow for showing only ordinary negligence. Because the ski area operators had faced similar lawsuits in recent years, he used a copy of the lawsuit, the summary judgment, and existing law to prepare this legislation. This has been reviewed by legal counsel for the Department of Fish, Wildlife and Parks.

{Tape : 1; Side : B; Approx. Time Counter : 10.52}

Doug Monger, Administrator of the Parks Division, Department of Fish, Wildlife and Parks (FWP), spoke in support of SB87. The legislature has mandated that the FWP operate and maintain the snowmobile program for the state of Montana to provide safe, ethical and legal use of snowmobiles on public lands. The FWP is specifically listed as a snowmobile area operator for the state of Montana. Additionally, they pass grant moneys to local community organizations to provide snowmobile trail grooming. Those organizations are also considered snowmobile area operators.

The snowmobile liability statute was designed to protect snowmobile area operators from lawsuits for conduct in operating snowmobile areas that were less than gross negligence. A district court overturned the statute.

A similar liability situation existed prior to 1989 in the downhill ski area industry. This problem has been fixed and tested before the Supreme Court. This statute asks for the same effect to occur under the snowmobile liability statutes. Written testimony of Doug Monger, **EXHIBIT(jus07a04)**.

Opponents' Testimony:

Al Smith, Montana Trial Lawyers Assoc., rose in opposition to SB87. He remarked that page 2, lines 12-16, sets in the reasonable care standard. However, lines 19-22 which are eliminated, also eliminate the gross negligence standard. Section 1 states a duty of reasonable care for maintenance vehicles. In a heavy snow year, there may be a tree branch that would be a danger. The removal would not be prudent and reasonable if it was left lying in the middle of the trail. This legislation seems to shift all the responsibility to the rider. Written testimony of **Al Smith, EXHIBIT(jus07a05)**.

George Ochenski, Citizen, raised a concern that this legislation may lessen the level of assessment of state agencies. He referred to a personal experience with the FWP's proposal to build a snowmobile parking lot halfway up the Beartooth Pass. This proposed parking lot was at the bottom of an avalanche shoot. The department had received a letter from the Forest Service stating that this was not a good place for parking. It also was an undue risk to plow that road all winter long. There are seven avalanche shoots that cross the pathway. It took quite a bit of effort to stop this project. This legislation is different from the ski area legislation because a ski area has a definite boundary. A ski area operator is responsible for the occurrences within the boundaries of that area. There is no boundary on the snowmobile activities in this state.

Questions from Committee Members and Responses:

SEN. DOHERTY believed it would be necessary for the legislation to contain a 2/3rds vote requirement since this addressed immunity of the State of Montana. **Mr. Lane** stated that this may be necessary. The bill lessens the state's liability from the present snowmobile area operator statute. The bill does provide for assumption of the risk by the people who operate snowmobiles and for this reason may require a 2/3rds vote.

SEN. DOHERTY asked for more information regarding the lawsuit which prompted this legislation. **Mr. Lane** explained that it was a decision in Federal District Court in 1997 that found portions of the Snowmobile Area Operators Responsibility Act unconstitutional. It found the provision that stated that snowmobile area operators are only responsible for gross negligence was unconstitutional because it provided a unique exception for a particular business without a rationale basis for being different from other business.

SEN. DOHERTY questioned whether in complying with the court decision regarding the gross negligence standard, this would leave no standard. He submitted that it may be appropriate to insert language regarding the regular negligence standard of reasonable and prudent. **Mr. Lane** stated that the amendments are to conform this statute with the Ski Area Responsibility Act which was found constitutional by the Montana Supreme Court. This held that the area operators are still responsible for their acts under the concept of ordinary negligence, §27-1-701. The bill requires that persons who are skiers or snowmobile operators assume certain inherent risks in the natural conditions of terrain when snowmobiling or skiing. He agreed to provide copies of the court's decision, **EXHIBIT(jus07a06)**, **EXHIBIT(jus07a07)**, and **EXHIBIT(jus07a08)**.

SEN. DOHERTY questioned whether the Ski Area Responsibility Act contained language which addressed the standard of care so that the ski area operator or the snowmobile area operator would know the standard of care expected of them. **Mr. Lane** stated that it was not contained in this legislation but was contained under the statute of ordinary negligence.

SEN. BARTLETT inquired about the total area that would be covered under this legislation. **Mr. Hoovestall** responded that this would apply only to the groomed trail system.

SEN. BARTLETT stated that the term "snowmobile area" is defined as being "the snowmobile trails . . . or areas open to the operation of snowmobiles." She suggested that in the definition

of snowmobile area, striking the language beyond the word "trails". **Mr. Hoovestall** added that there is no operator off the trail systems. He couldn't imagine how this could expand into areas where there is no operator. **Mr. Lane** stated that the bill was not intended to deal with all areas open to snowmobiles.

SEN. BARTLETT summarized that the definition of snowmobile area might be amended to read "snowmobile area means those areas designated as snowmobile trails." **Mr. Lane** suggested that the language state "designated as maintained snowmobile trails".

CHAIRMAN GROSFIELD asked what that would do to area operators' liability with respect to areas off of the maintained snowmobile trails. **Mr. Lane** responded that if you were off the trail, you are snowmobiling in areas in which no one has done anything for which they would have a responsibility. **Mr. Smith** disagreed. He added that it would be a mistake to limit this to maintained trails. More people snowmobile on the open areas that are under the jurisdiction of the state or the Forest Service. It would be a mistake to change the definition.

CHAIRMAN GROSFIELD stated that an area operator who rents snowmobiles may provide a map prepared by the snowmobile club or the Forest Service. This shows the trails and play areas, which are areas off the trail. Oftentimes, these areas are in areas that have been logged and may have stumps. These trails are marked with trail markers. He claimed that area operators should not have to cease making recommendations about play areas. **Mr. Lane** suggested further review of the legislation for amendments. There may be areas in which the operators should be included as part of this legislation.

SEN. DOHERTY asked why the comparative negligence statute was being eliminated. This is a well settled area of law. **Mr. Lane** clarified that the section that is being repealed eliminated comparative negligence from snowmobile area responsibility. The effect of this would be to allow comparative negligence to apply.

SEN. HALLIGAN asked for clarification of the reasonable care standard in Section 3(2). **Ms. Lane** stated that the subsection stated "except as provided in this section" which encompasses the entire section including (1) and the standard. Subsection (2) states that there is no duty except as provided in this Section which includes (1). This means that whatever is done must be done with the duty of reasonable care.

CHAIRMAN GROSFIELD added that the issue of maintenance of machines also needed to be addressed.

Closing by Sponsor:

SEN. HARGROVE summarized that since the summary judgment has been issued, the industry has been operating at more risk than it has in the past. There was an assumption that the same things that have stood the constitutional test for ski area operations would apply.

HEARING ON SB 16

Sponsor: **SEN. BOB KEENAN, SD 38, Bigfork**

Proponents: **Dal Smilie, Chief Legal Counsel, Department of
Administration
Gordon Morris, Montana Association of Counties**

Opponents: **Al Smith, Montana Trial Lawyers Assoc.
Jim Jensen, Montana Environmental Information
Center (MEIC)
George Bennett, Montana Bankers Association
Keith Colbo, Montana Independent Bankers (MIB)
John Flink, Montana Hospital Association (MHA)**

Opening by Sponsor:

SEN. BOB KEENAN, SD 38, Bigfork, introduced SB16. He commented that computer programers shortened the four digit date to two digits. As a result, mainframe and personal computers as well as software programs that control traffic, water, power, phone service, accounting services, supplies, etc., will be affected by this situation. In the year 2000, there is a possibility that computers will malfunction. Estimates of future litigation arising from this problem range up to a trillion dollars. In 1998, five states passed laws invoking sovereign immunity against such claims in order to protect taxpayers funds from the anticipated flood of litigation. This bill prevents claimants and their attorneys from threatening the state's fiscal stability by making the taxpayers of Montana their insurance for a problem created by the computer software industry. For the private sector, the bill encourages efforts to solve the problem instead of engaging in lawsuits. State and local governments and their employees may not be held liable for any harm caused directly or indirectly by Y2K errors. This immunity applies as long as the government's efforts to detect and prevent failure are reasonable. Should there be a problem with a check, all that will be expected is to receive the money and not a strike-it-rich lawsuit.

This bill offers a limitation of liability in the private sector if the failure does not result in bodily injury or certain other conditions regarding notice and repair are satisfied. Hospitals have concerns regard the bodily injury language. If a private sector defendant satisfies the applicable conditions, only an action based on contract can be brought against him. There is a protection for five years beyond the century change giving both the public and private sector time to detect, prevent, and correct all the potential problems. This bill does not grant complete immunity to government or private enterprise. It presents a balance between the effect of total immunity and the effect of excessive and socially useless litigation that is anticipated.

Proponents' Testimony:

Dal Smilie, Chief Legal Counsel, Department of Administration, presented his written testimony, **EXHIBIT(jus07a09)**. He explained that the first part of the bill limited liability for government. There needs to be a substantial compliance with generally accepted computer and information system standards. The legislation offers some definitions of the proper tests which government and the private sector need to meet to determine if they have carried out the level of effort needed.

The bill, as originally presented, appeared to contain protections for the private sector, including those in the stream of commerce making or selling hardware or software. Proposed amendments have been developed.

Persons making or selling hardware or software need to take specific steps. If the product is fairly new, a free fix needs to be offered. After the necessary steps have been taken, the liability is limited to contract liability.

Gordon Morris, Montana Association of Counties, stated that they have been working on this issue for over two years. Education alone cannot address all the problems included with this issue.

Additional handout, **National Associations of Attorneys General, EXHIBIT(jus07a10)**.

Opponents' Testimony:

Al Smith, Montana Trial Lawyers Assoc., spoke in opposition to the legislation. He remarked that the blanket immunity would deter the incentive to identify and correct Y2K problems. He referred to the proposed amendments 7(c)(exhibit 5), and stated that this would address some of their concerns. The criteria

that reasonable steps need to be taken is a good concept. This section applies to the part of the bill that deals with private enterprise and not with governmental entities. Section 2 addresses the governmental immunity. This does not contain the reasonable standard. He has been told that (c) should address the concern that government must meet. He disagreed.

This legislation primarily protects out-of-state corporations that are sending software and products into the state because that's primarily where the software and computer chips that might go wrong are developed. It will be the small businesses, individuals or large businesses in the state that might suffer the most harm. He said he didn't know if the new amendments would address this concern. He thought it was important to note what sorts of damages, from the state perspective, people might encounter. There was the possibility of the state retirement fund, where many recipients had their checks deposited directly into their bank account. Also, many people had their finances set up so their mortgage, car, etc., payments were paid automatically from their bank accounts. If a retirement check were late for a month, or if the car or mortgage payment didn't get made for that length of time, perhaps the loaning agency would be understanding and say everyone was having problems with Y2K and as soon as this was straightened out, the money could be sent. **Mr. Smith** suggested the attitude would be if the problems got straightened out in one month there would be no problem, but if it took longer, the retirees might not have other assets from which to make the payments so they could potentially lose their houses and cars. In the end, the most they could expect from **SB 16** would be retirement benefits for the past few months but they would not get their homes or cars back.

It is necessary to be careful before the damages are limited, and as for the liability, they needed to be told property damage may happen more often than bodily damage because, for example, a chip error could start a fire.

He suggested the public sector needed to be examined more broadly because there were issues that could come up regarding government's functions -- environmental hazards, damages from sewage treatment plants going bad, etc. **Mr. Smith** suggested before it was assumed nobody was liable for anything, it was necessary to look carefully at what was actually being limited. He said they generally opposed liability immunity. However, if everyone was required to meet "reasonableness standards" so reasonable steps had to be taken in order to identify and correct the problems, many of their concerns would be addressed, especially when applied to governmental entities. Written testimony of **Al Smith, EXHIBIT(jus07a11)**.

Jim Jensen, Montana Environmental Information Center (MEIC), said Mr. Smith alluded to the possibility of local governments having problems arising from failure or malfunction of their electronic equipment operating, i.e. publicly owned treatment works, sewage treatment plants. **SB 16** would limit the ability of the individuals who were harmed, unless they had bodily injury, from being compensated for the losses they could have other than bodily injury, i.e. substantial property damage. He said if the sewage backed up into the building(s) because the pumps weren't working, the harm could be bodily, but could also be related to bodily harm, i.e. substantial and difficult risks. He said **SB 16**, as written, also created an immunity provision which would prohibit or shield citizens from bringing suit to protect or defend or perfect a fundamental constitutional right -- right to a clean and healthful environment. He explained whether it was a private or publicly owned polluter, Montana citizens have that fundamental constitutional right -- **SB 16** attempted to harm that right.

Mr. Jensen said Montana drinking water supplies were mostly owned by municipalities, though a few were privately owned, and people needed to be able to believe the government entity was taking more than a cursory look at their systems. This was also true for those systems which were privately owned -- many are small community systems. When immunity was eliminated and a citizen's fundamental right to clean drinking water was impaired and our system, which was designed to require those owners to meet a high standard, failed or was placed at risk of failure, people both in government and the private sector needed to be worried about this problem. The intent of **SB 16**, as it was first introduced, seemed to be to protect manufacturers of chips, which could be a good argument there was a failure for which people should be held liable. He explained if one manufacturer didn't make this mistake, it seemed unfair to make a differential field of protection to others.

George Bennett, Montana Bankers Association, said their concern was by granting limited immunity to manufacturers, consultants and dealers in computers, a disincentive was provided for them to take the time between now and the end of the year to correct the problem -- to those types of people, a product liability situation. He explained if a product was manufactured, and if it was known for years there was a problem and nothing was done to correct it, the manufacturer would be held liable. The computer industry has known for years there would be a change when the century changed and has had every opportunity to correct it. He asked if it was prudent to grant immunity in that context. They'd like to see Mr. Smilie's amendments; however, at this point, they might be working against having those problems

corrected. As for the governmental entities, he saw their problem as seeking indemnity from manufacturers, consultants and dealers -- not wanting immunity for something they themselves did, i.e. the governmental entities will want to go after them.

Keith Colbo, Montana Independent Bankers (MIB), said the financial industry had been under a lot of pressure for well over two (2) years from the regulatory bodies to address the issue of the problem and have been and are continuing to be audited in terms of those efforts as well. He shared the concern that at this point immunity could lessen the effort of being compliant, particularly in the financial community. He said he felt Montana financial institutions had been making a very good-faith effort to address the problems brought about by Y2K. He stated many software programs were put into place before December 31, 1996, and fixes had to be found for those. He referred to the notice provisions in **SB 16** and said they gave him some concerns. He expressed appreciation for the amendments but since he hadn't seen them, he wasn't sure how to comment on them. He said the purpose of the bill was monumental and he appreciated why it was brought forward.

John Flink, Montana Hospital Association (MHA), said he would echo some of the concerns previously mentioned and had talked to **SEN. KEENAN** about them. He said they would welcome the opportunity to participate in the discussion of the amendments so those concerns could be addressed. He said **SB 16**, as originally drafted, would protect the vendors and manufacturers of software and hardware but would not protect the facilities themselves in the event a Y2K glitch caused a problem for the patients or procedures. He suggested health care facilities would be at great risk, especially because they were not-for-profit and could not absorb this kind of liability exposure.

Questions from the Committee and Responses:

SEN. DOHERTY asked if limiting the ability of Montana businesses to collect from out-of-state corporations who may cause them to lose profits was a good idea. **Dal Smilie** said his understanding of **SB 16** was if the product was manufactured recently, there needed to be a free fix; if it was manufactured before that, steps needed to be taken (assuming the purchaser was registered and not a pirate copy) to offer information for a fix, though not necessarily a free fix.

SEN. DOHERTY referred to the Montana Bankers Association and the Montana Hospital Association who said if their businesses went sour because of someone else's mistakes, they wanted to be able to go back against those individuals to ensure they were not the

ones "holding the bag." He also suggested striking that balance could be more difficult than at first glance -- frivolous lawsuits were not desired; yet, the ability to collect adequate compensation for someone else's mistakes should not be impeded.

Dal Smilie said the bill, as first presented, seemed to shield a limited set of businesses from liability if they took proper steps. He said the amendments were designed to broaden the array of Montana businesses if they took reasonable steps -- steps were set out in the statute. He suggested they were trying to strike a balance through the Legislature discussing if there was a way to suggest to the private sector there would be limited liability protection if positive steps were taken. Balancing that suggestion against no restriction was the issue the Legislature will have to discuss.

SEN. DOHERTY said what was happening with **SB 16** was changing the reasonable standard of care under traditional Products Liability Law for a specific industry. He referred to the example of an automobile manufacturer knowing there was defect which had to be dealt with but doing or not doing something about it, and said the example was useful. He asked for a review and explanation of the standards of the Products Liability Law, the law currently in force and which would be used in the absence of **SB 16**. **George Bennett** said governmental units didn't manufacture or sell computers. If the governmental units were granted immunity it was fine; however, if there was to be some liability persons would want to go back to the manufacturers, dealers, etc., to seek indemnity. He wondered why, in the private sector, immunity would be granted to people who developed a product and who knew there would be a change in the century. He suggested the geniuses who developed computers should be able to deal with a date change, and if immunity were granted to the manufacturers, it wouldn't be any different from a manufacturer who was knowingly manufacturing a defective product. **Mr. Bennett** asked why a computer should be any different from an automobile, article of clothing, etc.

SEN. GRIMES referred to the testimony regarding incentives and disincentives and said there were many small businesses in Montana whose ability to function would be affected because of a state government problem (licensor, certifications, inspections, etc.) which could be addressed if the incentives were there to address it. If those things were limited because someone could claim there was a computer glitch because of Y2K, and nothing was done manually or through paperwork even though it were possible to do so, that disincentive for regulators who have such control over the businesses would be created in **SB 16**. **SEN. GRIMES** illustrated by saying a business with a subdivision permit would be limited because of computer glitches which in turn would

affect its cost of operation because of the time delays. He asked **Dal Smilie** to address the issue. **Mr. Smilie** said he felt the purpose of the amendments was pretty simple, but agreed they were about a page and-a-half and were, therefore, rather confusing. He felt what **SB 16** mostly did was define the tests that everyone needed to consider, rather than let the court define them. With those tests defined, it was necessary to have substantial compliance with generally acceptable computer information systems standards, i.e. reasonable efforts to detect and prevent. He stated at present it was not clear whether the date issue was a computer defect or a product that wasn't made properly. He added that the projected amount for litigation that could come forward was about \$1 trillion.

SEN. GRIMES asked if this could potentially create a disincentive for business-friendly problem solving on the part of the regulators. **Dal Smilie** said they thought there was an incentive for both the public and private sectors to do some positive things before they would receive a very limited amount of liability protection -- **SB 16** contained an incentive to get them started working in order to get a very limited amount of immunity.

{Tape : 2; Side : B; Approx. Time Counter : 12.00}

Closing By Sponsor:

SEN. BOB KEENAN said he was fascinated by the discussion. He referred to the issue of property damage and suggested property insurance would cover property damage. Also, there seemed to be an assumption of intentional harm and negligence amongst the opponents, but he wasn't sure that would be here; rather, he hoped it was an incentive to follow through. He said he thought there would be burden of proof issues -- if there was harm done to a person who wanted to sue, the burden of proof would be on that manufacturer, etc., that they had made a good effort.

ADJOURNMENT

Adjournment: 12:10 P.M.

SEN. LORENTS GROSFIELD, Chairman

JUDY KEINTZ, Secretary

LG/JK

EXHIBIT(jus07aad)